

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN DUNSTON,

Defendant and Appellant.

B203829

(Los Angeles County
Super. Ct. No. BA326484)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

Sheldon L. Levitin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Elaine F. Tumonis, Deputy Attorney General, for Plaintiff and Respondent.

Kevin Dunston appeals from the judgment entered following a jury trial in which he was convicted of cocaine sales (Health & Saf. Code, § 11352, subd. (a)) and his admission that he had previously been convicted of the same offense. Defendant contends that the trial court erroneously failed to exercise its discretion in deciding whether to strike a prior conviction under Penal Code section 1385. We affirm.

BACKGROUND

On July 30, 2007, narcotics officers in the skid row area of downtown Los Angeles saw defendant handing a small amount of rock cocaine to another man in exchange for money. Defendant did not present any evidence at trial and argued that the officers were mistaken in their observations.

Following the jury verdict, defendant admitted having sustained two prior convictions. One was a 2006 conviction of simple possession of cocaine (Health & Saf. Code, § 11350) for which defendant had served a prison term. As a consequence of this prior conviction, defendant was subject to a one-year enhancement under Penal Code section 667.5, subdivision (b). The second prior was a 2000 conviction of cocaine sales (Health & Saf. Code, § 11352, subd. (a)), which subjected defendant to a three-year enhancement under Health and Safety Code section 11370.2, subdivision (a).

The probation officer's report reflected that defendant had an extensive criminal history, including a robbery in Ohio as well as misdemeanor and felony drug offenses in California. At the beginning of the sentencing hearing, the court stated that its "preliminary thoughts" were to strike the 2006 simple possession conviction and impose the low term of three years for the current offense and a three-year enhancement for the 2000 sales conviction. The court continued that the low term was appropriate because only a small rock of cocaine was involved, defendant's prior offenses did not involve "any serious crimes of violence" other than the Ohio robbery and a misdemeanor battery, and defendant was "still relatively a young man." Defense counsel added that defendant had "shown a good attitude throughout the course of the trial," and stated "it is within the court's discretion to impose the three-year prior or not impose a three-year prior." Counsel continued that given defendant's "de minimus conduct," the 2000 prior

conviction should be stricken and defendant should be sentenced to the mid or low term for the current offense.

The court responded: “I have taken all those things into account, including the fact that he’s certainly been very respectful here in court of the lawyers and the court and everybody else. [¶] The People offered to strike the [2000] sales prior to coming into the case [*sic*]. My understanding of the law is the court’s authority to strike the prior, the sales prior, is extremely limited. So that prior, having been proved, I do not really think I’m in a position to strike it. The reason that I would be selecting the low term is for all the reasons that I said plus the reasons that you mentioned.”

In further discussion, the court stated that in considering sentence it started at the mid term and determined that the low term was appropriate. “He does have a sales prior. He’s getting three years for it, and it doesn’t seem to me that he was any kind of significant seller.” Defendant was then sentenced to the low term of three years with a three-year enhancement, for a total of six years in state prison.

DISCUSSION

Defendant contends that the trial court erred in failing to exercise its discretion regarding whether to strike the 2000 sales prior conviction under Penal Code section 1385.¹ We disagree.

¹ Penal Code section 1385 provides: “(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

“(b) This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.

“(c)(1) If the court has the authority pursuant to subdivision (a) to strike or dismiss an enhancement, the court may instead strike the additional punishment for that enhancement in the furtherance of justice in compliance with subdivision (a).

(footnote continued on next page)

Defendant asserts, and the Attorney General aptly agrees, that a Health and Safety Code section 11370.2 sentence enhancement may be stricken under Penal Code section 1385. (See *People v. Meloney* (2003) 30 Cal.4th 1145, 1154–1155.) But contrary to defendant’s contention, the record does not establish that the trial court was unaware of its discretion to strike defendant’s prior conviction of cocaine sales. Rather, the court demonstrated knowledge of its authority under Penal Code section 1385 by striking defendant’s 2006 prior conviction. Nor did the court question defense counsel’s position that the 2000 prior conviction could be stricken. (Cf. *People v. Rivas* (2004) 119 Cal.App.4th 565, 574 [“trial court expressly stated it acted based on its belief it had no discretion to strike . . . enhancement”].)

A decision to strike an enhancement under Penal Code section 1385, subdivision (a), is one made “in furtherance of justice.” Here, the trial court gave careful consideration to the appropriate prison term based on defendant’s crime and his criminal record. In context, the court’s reference to its limited authority to strike the sales prior was more a recognition that this was defendant’s second conviction of sales and that defendant was getting the benefit of a low-term sentence. Accordingly, defendant’s contention must be rejected.

(footnote continued from previous page)

“(2) This subdivision does not authorize the court to strike the additional punishment for any enhancement that cannot be stricken or dismissed pursuant to subdivision (a).”

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

BAUER, J.*

* Judge of the Orange County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.